TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. [illegible]53

ASAHEL GOODWIN, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED DECEMBER 7, 1871.

SUPREME COURT OF THE UNITED STATES.

No. 497.

ASAHEL GOODWIN, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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1 United States Court of Claims.

[5945. Filed May 21, 1871]

To the hon. the judges of the Court of Claims:

The petition of Asahel Goodwin, of Cape Neddick, York County, State of Maine, a citizen of the United States, respectfully showeth unto your honors:

That your petitioner, on the 26th day of August, A. D. 1865, was the owner of the schooner "Othello," of 346 $\frac{32}{100}$ tons burden, of the port of York, in said State, duly enrolled and licensed, as will more fully appear by a duly certified copy of enrollment, hereunto annexed, then lying and being at the port of Wilmington, North Carolina, whereof Daniel F. Maxwell was master and agent of the owner.

That said Maxwell, as master and agent of your petitioner, at said port of Wilmington, and on the day aforesaid, entered into a contract of charter-party with the United States, through the agency of A. S. Gears, acting quartermaster of the United States, for that purpose duly authorized and empowered, wherein and whereby, among other things, it was agreed that your petitioner should charter to the United States said schooner, for such term of time as the United States might desire, until said schooner should be discharged from said charter upon her return to the port of Wilmington, N. C., aforesaid, the danger of the seas alone preventing. Said charter to commence on the 26th day of August, A. D. 1865, at six o'clock p. m., at the daily compensation of $50 for each and every day from the date of charter to the date and place of discharge. And the United States, on its part, promised and agreed to pay your petitioner for each and every day said vessel should be so employed, and until she should be discharged at the port aforesaid, the sum of $50 per day.

2 And your petitioner avers that said vessel entered into the service and possession of the United States, and so continued until she was discharged from said charter at the port of Wilmington, N. C., on the 17th day of August, A. D. 1866.

That the money due on said charter-party was regularly paid up to March 1, 1866, and nothing more paid since.

That there is now justly due and owing to your petitioner, on said contract of charter-party, $50 per day, computing from said 1st day of March, 1866, inclusive, to the 17th day of July, 1866, inclusive, making the sum of $8,500, together with the further sum of $308.72, for wharfage and port charges, which your petitioner was compelled to pay, properly chargeable to the United States, and for which he should be reimbursed, making, in the aggregate, the sum of $8,808 72.

That your petitioner has made application to the Quartermaster General and the Treasury Department for the payment of the same, who decline and refuse to pay the same, and intimate your petitioner is remediless, only through the Court of Claims.

Your petitioner annexes to this petition, and makes part of the same, a copy of the charter-party, duly certified, with the endorsements thereon.

And your petitioner further alleges that he is a loyal citizen of the United States; that he never, at any time, has given any aid or comfort to the late rebellion against the United States, or aid or encouragement thereto; that he has made no assignment or transfer of said claim, or

any part thereof, and that he is not indebted to the United States in, nor is there any just offset to, said claim.

ASAHEL GOODWIN.

P. O. address, Cape Neddick, York Co., State of Maine.

STATE OF NEW HAMPSHIRE,
Rockingham County:

On this 4th day of May, A. D. 1869, personally came Asahel Goodwin, who signed the foregoing petition, and made solemn
3 oath that the matters and things set forth in his said petition are just and true, according to his best knowledge and belief.

W. H. Y. HACKETT,
Com'r U. S. Circuit Court for New Hampshire District.

T. J. D. FULLER, *Solicitor of Claimant.*
P. O. address, Washington City, D. C.

Permanent enrollment, No. 11.

Enrollment in conformity to an act of the Congress of the United States of America, entitled "An act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same," approved February 18, 1793, and of "An act to regulate the admeasurement of tonnage of ships and vessels of the United States," approved May 6, 1864.

Asahel Goodwin, of York, State of Maine, having taken or subscribed the oath required by the said act, and having sworn that he is a citizens of the United States, sole owner of the ship or vessel called the Othello, of York, whereof Joseph F. Swett is at present master, and, as he hath sworn, is a citizen of the United States, and that the said ship or vessel was built at York, State of Maine, in the year 1865. And Samuel Webber, inspector of customs, having certified that the said ship or vessel has two decks and two masts, and that her length is one hundred and fourteen and three-tenth feet; her breadth, twenty-nine and eight-tenth feet; her depth, fourteen and three-tenth feet; her height ; and that she measures three hundred and forty-six tons and thirty-two one hundredths, viz:

	Tonnage.
Capacity under tonnage deck.....	$346\frac{32}{100}$
Capacity between decks above tonnage deck.....	
Capacity of enclosures on the upper deck.....	
Total tonnage.....	$346\frac{32}{100}$

And that she is a schooner, has an elliptic stern and billet-head. And the said Asahel Goodwin having agreed to the description and admeasurement above specified, and sufficient security having been given, according to the said acts, the said schooner Othello has been duly enrolled at the port of York.

Given under my hand and seal, at the port of York, this 14th day of June, in the year one thousand eight hundred and sixty-five.

[L. S.] JERE'H S. PUTNAM, *Collector.*

CUSTOM-HOUSE, YORK, *April* 19, 1869.

I hereby certify that the foregoing is a true copy of an enrollment issued at this office, June 14, 1865, to the schooner Othello, then of York.

JERE'H S. PUTNAM, *Collector.*

"*Othello.*"

This charter-party of affreightment, made this 26th day of August, in the year 1865, between Daniel F. Maxwell, master and agent for owner of the schooner or vessel called the "Othello," of York,
4 Maine, of the burden of 346$\frac{42}{95}$ registered tons, or thereabouts, at present lying in the harbor of Morehead City, N. C., and commanded by Daniel F. Maxwell, of the first part, and Captain A. S. Gear, assistant quartermaster United States Army, for the United States, of the second part, witnesseth: That the said party of the first part does and doth hereby grant and to freight let, and the said party of the second part does and doth hereby to freight take, the said schooner, to load at Wilmington, N. C., or elsewhere, and proceed on the voyage hereinafter mentioned. (Always reserving sufficient room for the stowage of the vessel's cables and materials, and accommodation of the officers and crew; and, if a steam vessel, for necessary supply of coal.) And thereupon the party of the first part, and his heirs, executors, administrators, and assigns, doth hereby covenant, grant, and agree, to and with the said party of the second part, that the said vessel now is, and shall be kept and maintained, during the whole of the voyage mentioned in this contract, tight, staunch, strong, and well and sufficiently manned, victualled, tackled, appareled, and ballasted, and furnished in every respect fit for merchant's service, at the cost and charge of her owners. (The time lost in consequence of any deficiency in these respects, not to be paid for by the United States.) And shall, on the 26th day of August, 1865, be ready to receive on board, whenever tendered alongside by the quartermaster United States Army, his factors or assigns, such troops, men, animals, and supplies, or cargo, as they shall order and direct, and the said vessel can conveniently stow and carry. And, when laden, shall proceed, with the first good opportunity, and without delay, from the port of Wilmington, N. C., or elsewhere, and proceed direct to such ports and places as ordered by the quartermaster United States Army, and deliver cargo to the quartermaster, or duly authorized agent of the Quartermaster's Department. All pilotage and port charges will be paid by the United States after leaving the port of Morehead City, N. C. All cargo to be received and delivered within reach of the said vessel's tackles. The said vessel shall deliver her cargo in good order and condition, (the dangers of the seas, fire, and navigation, and the restraints of princes and rulers being always excepted.) The war risk to be borne by the United States. The marine risk to be borne by the owners.

In consideration whereof, the said party of the second part does agree to employ the said vessel on the voyage or voyages aforesaid; and that, as a freight or hire of the said vessel during the term of this contract, he will pay, or cause to be paid, the full and just sum of fifty dollars per day for each and every day said vessel may be employed, and will furnish all fuel necessary for the navigation of the said vessel, if a steamer, until the said vessel is returned to the said party of the first part in Morehead City, N. C., in the same order as when received, ordinary wear and tear, damage by the elements, collision at sea and in

port, bursting of boilers, and breakage of machinery excepted: To become due, owing, and payable in the manner and form following, that is to say, payable to the order of Daniel F. Maxwell, at the quartermaster's office of the United States, at Morehead City, N. C., monthly, upon presenting certificates of the duly authorized agent of the Quartermaster's Department that the said vessel has faithfully performed her part of this contract.

The said vessel is valued and appraised at the sum of $30,000, and should she be retained so long in the service of the United States that the money paid and due on account of said charter (deducting therefrom the actual cost of running and keeping in repair the said vessel during the same time, together with a net profit of 50 per cent. per annum on said appraised value,) shall be equal to said appraised value, then the said vessel shall become the property of the United States without further payment, except such sum as may then be due on account of the services of the said vessel, rendered under the said charter.

And further, if, at any time during the continuance of this charter, the United States shall elect to purchase the said vessel, then they shall have the right to take her at the appraised value at the date of charter, and all money then already paid and due on account of said charter (deducting therefrom the actual cost of running and keeping in repair the said vessel during the said time, together with a net profit of 50 per cent. per annum on the original appraised vaule) shall apply on account of the said purchase.

This charter shall go into effect at 6 o'clock, p. m., of the 26th day of August, 1865, and shall continue in force as long as said vessel may be required by the United States War Department.

No member of Congress shall be admitted to any share or part of this contract, or any benefit to arise therefrom.

In witness whereof the said parties to these presents have hereunto interchangeably set their hands and affixed their seals, on the 26th day of August, 1865.

(Executed in quintuplicate.)

D. F. MAXWELL. [L. S.]
A. S. GEAR, [L. S.]
Capt. and A. Q. M.

Signed, sealed, and delivered in the presence of—
R. O. GREENLEAF.
J. O. HORTON.

[Stamps.]

A true copy of the original on file in this office.

J. M. BRODHEAD,
Comptroller.

SECOND COMPTROLLER'S OFFICE, *May* 7, 1869.

Certificates of service.

CHIEF QUARTERMASTER'S OFFICE,
DISTRICT OF WILMINGTON,
Wilmington, N. C., November 2, 1865.

Certificate of service given from August 27, 1865, to August 31, 1865, both dates inclusive.

H. B. BLACKMER,
Capt. and A. Q. M.

CHIEF QUARTERMASTER'S OFFICE,
DISTRICT OF WILMINGTON,
Wilmington, N. C., November 2, 1865.

Certificate of service given from September 1, 1865, to September 30, 1865, both dates inclusive.

H. B. BLACKMER,
Capt. and A. Q. M.

CHIEF QUARTERMASTER'S OFFICE,
DISTRICT OF WILMINGTON,
Wilmington, N. C., November 2, 1865.

Certificate of service given from October 1, 1865, to October 31, 1865, both dates inclusive.

H. B. BLACKMER,
Capt. and A. Q. M.

ASSISTANT QUARTERMASTER'S OFFICE,
Morehead City, N. C., November 4, 1865.

Paid from August 26, 1865, at 6 o'clock p. m., to October 31, 1865, inclusive, by certificates of indebtedness, (Form 22.)

A. S. GEAR,
Capt. and A. Q. M.

(In red ink:) This appears to be a more consolidated memorandum of Nos. 1, 2, and 3.

From THIRD AUDITOR'S OFFICE.]

ASSISTANT QUARTERMASTER'S OFFICE,
New York, August 7, 1866.

Discharged from the service at noon to-day, ten days allowed to return to Morehead City, N. C., where she was chartered, to commence at noon to-day.

JOHN R. JENNINGS,
Bvt. Maj. and A. Q. M.

ASSISTANT QUARTERMASTER'S OFFICE,
New York, August 7, 1866.

The Othello was under suspension from 1 o'clock p. m., March 1, 1866, to 7 a. m., July 30, 1866, service for said time not to be paid unless ordered by the Quartermaster General.

JOHN R. JENNINGS,
Bvt. Maj. and A. Q. M.

CHIEF QUARTERMASTER'S OFFICE,
New York, August 13, 1866.

Certificate of service given from November 1, 1865, to 1 p. m., March 1, 1866.

JOHN R. JENNINGS,
Bv't Maj. and A. Q. M.

ASSISTANT QUARTERMASTER'S OFFICE,
New York, August 24, 1866.

Certificate of service given from 1 p. m., March 1, to noon of August 7, 1866, and for ten additional days, to commence at noon on 7th August,

in lieu of vessel going to Morehead City, N. C., where she was chartered, for discharge.

7 150 $\frac{18}{24}$ days, while under suspension, to be charged against the vessel; also wharfage for that period should never have been paid by the Government; and also the stevedore's bill for discharging the Othello, amounting to $308.72, to be charged against said vessel.

JOHN R. JENNINGS,
Bvt. Maj. and A. Q. M.

8 In the United States Court of Claims. December term, A. D., 1868.

ASAHEL GOODWIN
vs.
THE UNITED STATES. } No. 5945. Filed May 21, 1869.

And the said defendants, by their Attorney General, come and make answer to the petition of the claimant herein; and, not confessing the same, or any part thereof, deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the said United States are indebted to the said claimant in the sum of $8,808.72, the said defendants say that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the said defendants deny the said allegation.

T. LYLE DICKEY,
Assistant Attorney General.

9 In the United States Court of Claims.

ISAHEL GOODWIN
vs.
THE UNITED STATES. } 5945.

And now the claimant, under the general order of the court, files this his amendment to his original petition, and avers that he, at all times, has borne true allegiance to the Government of the United States.

ASAHEL GOODWIN,
By his att'y T. J. D. FULLER.

Subscribed and sworn before me at the city of Washington, D. C., April 5, 1871.

[SEAL.]

N. CALLAN,
Notary Public.

Filed April 7, 1871.

10 In the Court of Claims.

ASAHEL GOODWIN
vs.
THE UNITED STATES. } 5945.

At a Court of Claims held at the Capitol in the city of Washington, twenty-sixth of May, A. D. 1871, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the defendants, and do order, adjudge, and decree that the said claimant take nothing by his petition, and that the same be dismissed.

By the court.

A true copy of record.

11 In the United States Court of Claims.

ASAHEL GOODWIN
vs. } 5945.
THE UNITED STATES.

In the above-entitled cause wherein the court has rendered judgment for the defendants, the claimant appeals from the judgment of the court to the Supreme Court of the United States, and prays the same may be allowed by the court.

T. J. D. FULLER,
Counsel for Cl'm't.

Filed in the clerk's office June 1, 1871.

ASAHEL GOODWIN
vs. } 5945.
THE UNITED STATES.

Ordered that the appeal prayed for be allowed.

June 1, 1871.

By the court.

12 Court of Claims.

ASAHEL GOODWIN
vs.
THE UNITED STATES.

Finding of facts and conclusions of law.

Upon examination and consideration of the evidence in this case, the court finds the facts therein to be as follows:

On the 26th of August, 1865, the claimant, a resident of York, Maine, acting by and through his agent, Daniel F. Maxwell, master of the schooner Othello, then in the harbor of Morehead City, North Carolina, entered into a charter-party of affreightment with Captain A. S. Gear, assistant quartermaster U. S. Army, for the United States, whereby the said schooner was to freight let to the said Gear to load at Wilmington, North Carolina, or elsewhere, and proceed direct to such ports or places as ordered by the quartermaster U. S. Army, and deliver cargo to the quartermaster or duly authorized agent of the Quartermaster's Department. The said charter was, by its terms, to go into effect on the day of its date, and to continue in force as long as said vessel might be required by the United States War Department.

By the terms of said charter-party, among other things, it was—

13 1. Covenanted and agreed on the part of the claimant that the said vessel was then, and should be kept and maintained during the whole voyage mentioned in said charter-party, tight, staunch,

strong, and well & sufficiently manned, victualled, tackled, apparelled, and ballasted, and furnished in every respect fit for merchant's service, at the cost and charge of her owners, and that the time lost in consequence of any deficiency in these respects should not be paid for by the United States:

2. Agreed between the parties that the war risk should be borne by the United States, and the marine risk by the owners.

3. Agreed on the part of the United States to employ the said vessel on the voyage or voyages specified, and as a freight or hire therefor during the term of the contract to pay the sum of $50 per day for each and every day she might be employed; to become due, owing, and payable to the order of the master at the quartermaster's office of the United States at Morehead City, North Carolina, monthly, upon presenting certificates of the duly authorized agent of the Quartermaster's Department, that the said vessel had faithfully performed her part of the said contract; and—

14 4. Agreed that the vessel was valued and appraised at $30,000.

On the 15th of November, 1865, the Othello, laden with ordnance & ordnance-stores of the United States, at Wilmington, North Carolina, was ordered by the chief quartermaster of the district of Wilmington to proceed, without delay, to New York City, and report to Brevet Brigadier General Stewart Van Vliet, quartermaster U. S. A., for discharge of cargo.

On the 17th of said November she got under way, and put to sea on this voyage, but was forced, by stress of weather, and springing a leak, to bear away and put into St. Thomas, West Indies, for repairs on the 12th of December, 1865, and, on the 28th of that month, information of her having so put into St. Thomas was received, by letter, by the U. S. quartermaster at New York City.

At. St. Thomas, G. W. Smith & Co. advanced the money necessary to repair the vessel, and, for security for the repayment thereof, the master of the vessel, on the 25th of January, 1866, without having communicated or attempted to communicate with the United States, or with any one in the Quartermaster's Department of the Army of the United States, or with any one authorized to represent the United States, in regard to the cargo of said vessel, as to his intention to hypothecate the cargo of the vessel, executed to said G. W. Smith & Co., for

15 their advances and charges, a bottomry-bond, whereby he hypothecated the said vessel, freight, and cargo, for the sum of $15,535.46, in gold, with a premium of 12 per cent. for the voyage, making a total of $17,399.71, in United States gold coin, payable at or before the expiration of ten days after the arrival of the said vessel at New York, and with stipulation that neither vessel, freight, nor cargo should be delivered to any other use or purpose whatsoever, till the said bond should be first paid, together with the premium thereon, as therein agreed.

The Othello sailed from St. Thomas on the 25th of January, 1866, and arrived in the port of New York on the 13th of February ensuing.

The master and the owner of the vessel failed to pay the bottomry-bond within the time of payment therein stipulated, and the vessel and cargo were libelled therefor in the United States district court, and, on the 10th of March, 1866, were attached. The vessel was detained under the proceedings in said court until the 30th day of July, 1866.

On the 26th of that month the cargo was discharged from the marshal's custody, in consequence of a decision of the United States circuit court, on appeal from the district court, that the latter court had

no jurisdiction to subject the cargo, belonging to the United States, to the payment of said bond; and judgment was entered against
16 the vessel for the full amount of the bond.

On the 7th of August, 1866, the Othello was at New York, discharged from the service of the United States, with allowance of ten days to return to Morehead City, North Carolina, to which point, by the terms of the charter-party, she was required to be returned for discharge from the service.

All claim against the United States, on the part of the claimant, in general average, has been adjusted and paid; as also all claim for per diem-compensation of the Othello, under the charter-party, except for 150¾ days, between the 10th of March, 1866, and the 30th of July, 1866, during which she was detained by the marshal, under the aforesaid libel, to recover compensation, for which period this suit is brought.

Upon the foregoing facts, the conclusion of law is that the detention of the Othello by the marshal resulted from marine risks, which the claimant, in the charter-party, assumed; that the master of the Othello had no authority, without communicating or attempting to communicate his intention to the defendants, to hypothecate her cargo; that her detention was owing to the claimant's failure to pay the bottomry-bond according to its terms; and that the defendants are not liable for the per-diem-compensation for the Othello during the period of her
17 detention under legal process sued out for the recovery of the amount of said bond.

By the court.

(Indorsed:) 5945. Asahel Goodwin vs. The United States. Finding of facts and conclusions of law.

18 In the United States Court of Claims.

ASAHEL GOODWIN *vs.* THE UNITED STATES. } No. 5945.

And the Court of Claims, in addition to its own findings of facts, does, at the special instance and request of the claimant, (the defendants not objecting,) make the following additional finding:

That the United States and the claimant, at the port of New York, assented to a new valuation of the cargo to be made by the ordnance officers of the United States, and the St. Thomas valuation of the cargo was reduced to seventy-four thousand dollars. That the claimant offered to pay his, or the vessel's, proportion of the general average upon the New York valuation, provided the def'ts would pay their proportion, which the def'ts declined to do.

The proportion of the average due upon the cargo was afterwards paid by the United States on claimant's application to the accounting officers of the Treasury in 1868. That, from the time of the arrival of the Othello at New York until her discharge, August 7th, 1866, the master of the Othello was required to report daily to the quartermaster at the port of New York, and did so report.

19 That the endorsements made upon the charter, under the date of August 7th, & following, were made by the quartermaster, after the discharge of the Othello, without the knowledge or assent of the claimant, while the contract of charter-party was loaned to him for

a wholly different purpose. The owner of the schooner Othello resided in York, Maine. The vessel was detained at St. Thomas, undergoing her repairs forty-four days. The actual cost of the repairs upon the vessel in St. Thomas was less than three thousand dollars, and the balance of the amount for which the bottomry-bond was given, was made up upon the expense of unlading and lading the cargo, storage, commissions, &c. The def'ts claimed to have the sole and exclusive possession of the ship and cargo in New York, pending the proceedings in admiralty, and the defense to the suit was assumed by the United States, under instructions for that purpose from the War Department through the proper channel to the district attorney, Gen. Van Vliet, on two occasions, pending the suit, telegraphing to the Quartermaster General for instructions in relation to the Othello, she being under charter at fifty dollars per day, and the Quartermaster General declined to give any instructions, but referred him to the district attorney for advice and instructions in the premises.

(Indorsed:) 5945. Goodwin vs. The United States.

20 In the Court of Claims of the United States. December term, 1870.

ASAHEL GOODWIN
vs.
THE UNITED STATES. } No. 5945.

The following findings, proposed by the defendants, were refused by the court:

On the 26th day of August, 1865, the claimant, by contract of charter-party, freight-let his vessel, the Othello, to the defendants. By the terms of this charter-party the Othello, when laden, was to proceed without delay from Wilmington, N. C., or elsewhere, "direct to such ports and places as ordered by the quartermaster United States Army, and deliver cargo to the quartermaster or duly authorized agent of the Quartermaster's Department." During the whole of such voyage the owner was to keep and maintain the vessel tight, staunch, strong, well and sufficiently manned, &c., furnished in every respect fit for merchant's service. The war risks were to be borne by the United States; the marine risks by Goodwin. The defendants, by said charter-party, agreed to employ the Othello on the voyage or voyages aforesaid,
21 and to pay the sum of fifty dollars per day for each and every day the vessel was employed, said sum being payable upon the master's presentation of certificates of the duly authorized agents of the Quartermaster's Department that the said vessel had faithfully performed her part of this contract. The charter-party valued and appraised the vessel at thirty thousand dollars. The Othello, laden ordnance and ordnance-stores, at Wilmington, N. C., on November 15, 1865, was ordered to proceed without delay to New York City and report to Gen. Van Vliet, quartermaster, for discharge of cargo.

She got under way on this voyage; but was forced by stress of weather and sea to put in for repairs at St. Thomas, December 12, 1865. At this port G. W. Smith & Co. advanced the money necessary to repair the vessel, and charged a commission of two per cent. upon the value of the cargo, of which their appraisement at St. Thomas was grossly exorbitant and unjust. The Othello sailed for New York on January 25, 1866. On that day, without previously communicating or attempting to com-

municate with the defendants, (owner of the cargo,) the master
22 executed to G. W. Smith & Co., for their advances and charges, a bottomry bond, (printed on page 35 of the record,) whereby he hypothecated the ship, freight, and cargo for the sum of $15,535.46, in gold, with a premium of 12 per cent. for the voyage, making a total of $17,399.71, in United States gold coin.

Among other provisions the bond contained the following: "The cargo is thus hypothecated and assigned over as aforesaid for the security of the money so borrowed and taken up as aforesaid, and shall be delivered to no other use or purpose whatever until this bond is first paid, together with the premium thereon, as above agreed." The said sum was made payable at or before the expiration of ten days after the vessel's arrival at New York.

She arrived at this port on February 13, 1866. The master and the claimant, his principal, failing to redeem the bottomry-bond on March 9, 1866, the vessel and cargo were libeled in the United States district court, and the next day were attached. Goodwin, then willing to pay the proportion of the bottomry which his vessel was liable to contribute in general average, refused to secure the release of the Othello unless the United States contributed at that time what was due from
23 them in general average. The contribution then demanded was based upon the exorbitant St. Thomas appraisements. The United States refused to pay the contribution then, and, in November, 1867, and July, 1868, paid to Goodwin to his acknowledged full satisfaction, their contribution, as based upon a New York appraisement satisfactory to both parties.

In the proceedings against the Othello on the bottomry-bond, the cargo, on defendant's plea to the jurisdiction, was discharged from the marshal's custody, on July 26, 1866; and judgment of the whole bottomry debt was finally entered against the Othello.

On August 7, 1866, the vessel was discharged from the service of the United States.

The following were the certificates of service:

"ASSISTANT QUARTERMASTER'S OFFICE,
"*New York, August* 7, 1866.

"The Othello was under suspension from 1 o'clock p. m., March 1, 1866, to 7 a. m., July 30, 1866; service for said time not to be paid unless ordered by the Quartermaster General.

"JOHN R. JENNING'S,
"*Bvt. Maj. and A. Q. M.*"

24 "ASSISTANT QUARTERMASTER'S OFFICE,
"*New York, August* 24, 1866.

"Certificate of service given from 1 p. m., March 1, to noon of August 7, 1866, and for ten additional days, to commence at noon on 7th August, in lieu of vessel's going to Moorehead City, N. C., where she was chartered, for discharged. 150$\frac{18}{24}$ days, while under suspension, to be charged against the vessel; also, wharfage for that period should never have been paid by the Government, and also the stevedore's bill of discharging the Othello, amounting to 308.72, to be charged against said vessel.

"JOHN R. JENNINGS,
"*Bvt. Maj. and A. Q. M.*"

The petitioner now claims at the rate of fifty dollars per day for the number of days the vessel (as per certificate) was under suspension, and this the defendants refused to pay.

(Indorsed:) 5945. Asahel Goodwin vs. The United States.

25 In the Court of Claims.

ASAHEL GOODWIN
vs.
THE UNITED STATES. } No. 5945.

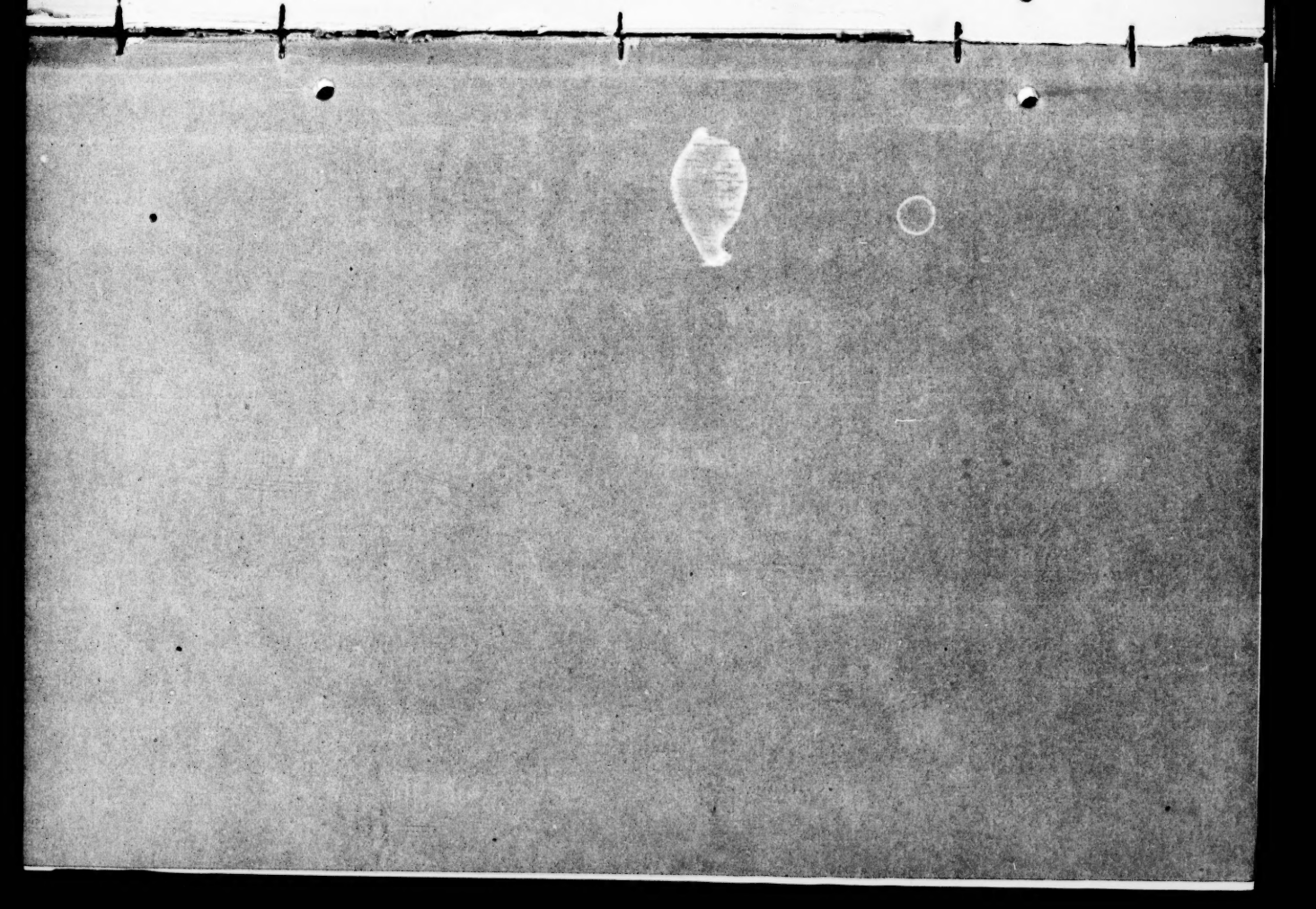
I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon; of the application of the counsel of the said claimant for the allowance of an appeal, as filed in the clerk's office, June 1, 1871, and of the order of the court of June 1, 1871, allowing the same; of the findings of fact and conclusion of law thereon, on which the court founded its judgment; also, an additional finding proposed by claimant and allowed by the court; also, the proposed findings of defendants which were refused by the court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this sixth day of December, A. D. 1871.

[SEAL.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 497. Asahel Goodwin, appellant, vs. The United States. Court of Claims. Filed 7th December, 1871.



Supreme Court United States.

ASAHEL GOODWIN, Appellants,
vs.
THE UNITED STATES, Appellee.

No. .....

CLAIMANT'S BRIEF.

T. J. D. FULLER,
Counsel for Appellee.

M'GILL & WITHEROW, PRINTERS AND STEREOTYPERS, WASHINGTON, D. C.

Supreme Court of the United States.

ASAHEL GOODWIN,
Appellant,

vs.

THE UNITED STATES,
Appellee.

No.

CLAIMANT'S BRIEF.

This action was brought in the Court of Claims, to recover from the United States a sum of money due from the defendants on a contract of charter-party, for one hundred and fifty and three-quarter days, at $50 per day, and certain other incidental expenses, for port charges, &c., of $308 72, making $7,846 22 in the aggregate.

A condensed statement of the facts, in a chronological order, are as follows:

The schooner "*Othello*," of $346\frac{42}{100}$ burden, of the value of $30,000, enrolled and licensed at the port of York, Me., the appellant, sole owner, D. F. Maxwell being the master, was lying at the port of Morehead City, N. C., where, on the 26th day of August, 1865, a contract of charter-party was entered into between the United States, by A. S. Gear, Capt. and A. Q. M., and the owner, by D. F. Maxwell, master.

Wherein, among other things, it was agreed, that the United States should pay the appellant for the use of his vessel, officers, and crew, the sum of fifty dollars per day, "*for so long a time as the use of the vessel should be required by the United States War Department.* The charter to commence at 6 p. m , August 26, 1867. The war risk to be

borne by the United States, the sea risk by the owners. That the vessel was tight, staunch, and strong, and shall be kept so at the cost of the owner; and if at any time the vessel should become otherwise, the defendants should not pay the per diem while the vessel was undergoing repairs. Cargoes to be delivered in good order and condition, the danger of the seas, fire, and navigation, and the restraint of princes, excepted."

In November, 1865, the vessel was laden with ordnance and ordnance stores, and her cargo was consigned by the chief quartermaster of the North Carolina district to General Stewart Van Vliet, chief quartermaster at New York city, and sailed on the voyage. On the passage the vessel encountered tempestuous weather, sprang a leak by the perils of the sea, leaking badly, 1,200 strokes per hour. The captain changed his course, and bore away for the West Indies, and made the port of St. Thomas, in the Danish Island of St. Thomas, about the 12th of December, 1865, in a leaking and crippled condition.

The captain unloaded, and stored his cargo, repaired his vessel, reloaded his vessel with the cargo, sailed from St. Thomas the 25th of January, and arrived at the port of New York with the entire cargo on the 13th February, 1866.

The captain, being in a foreign port, in distress, without money or credit, before he could sail and clear his vessel and cargo, was compelled to execute a bottomry bond upon *vessel*, *freight*, *and cargo*, in the sum of $17,399 17 in gold, with twelve per cent. interest, and payable within ten days after the arrival of the vessel and cargo in the port of New York.

Of this sum less than three thousand was expended in repairs on the vessel, and the remainder was made up of the expenses of unlading, storing, and relading the cargo, and commissions charged upon the cargo. The vessel was detained at St. Thomas forty-four days. The master did not notify either the owner of the vessel, or the United States consul, of his bottomry upon the vessel and cargo.

The master, upon his arrival at New York, claimed and demanded a contribution in general average for the expenses incurred in St. Thomas, from his consignee, General Van Vliet. This was refused, upon the ground that the valuation of the cargo at St. Thomas was excessive; whereupon the master and General Van Vliet agreed to refer the question of the value of the cargo to the arbitrament of the United States ordnance officers of the Watervliet arsenal, and they made a valuation, greatly reducing the St. Thomas valuation, appraising the cargo at $74,000; whereupon a new adjustment of the average was made at the port of New York, on the basis of the agreed valuation of the vessel and the re-appraised value of the cargo. The captain then demanded payment and contribution from the United States, offering and being able to pay the vessel's proportion of average, provided the United States would pay its proportion. The captain also claimed a lien upon the cargo for the payment or security of the average due upon it, according to the New York adjustment.

Upon the 11th of March, 1866, the bottomry bond obligees libelled the vessel and cargo in the district court for the southern district of New York. The Secretary of War, in behalf of the United States, interposed the claim of title and possession to the vessel and cargo, and by instructions, through the Secretary of the Treasury to the district attorney for the southern district of New York, he appeared for the United States and plead title to the vessel and cargo in the United States, that the vessel was a ship of war, and the cargo munitions of war; and denied the jurisdiction of the court over the subject-matter of the suit. The master appeared for the owner, and admitted the charter of the vessel to the United States; alleged the bottomry bond grew out of the necessity of the case and the perils of the sea; that the amount of the St. Thomas valuation, he believed, was excessive, but that he was not acquainted with the value of the kind of property which made the cargo. The district court dismissed the libel for want of jurisdiction, and the libel-

lants appealed to the circuit court. Upon hearing in the circuit court, before Judge Nelson, the decree of the district court was *affirmed* in part—in so far as it related to the cargo; but *reversed* the ruling of the district judge as to the vessel: deciding the bottomry bond was valid to bind the vessel; and the suit ordered to proceed to a hearing; and final judgment was entered up against the "Othello," in the sum of $29,302 60, as the debt, interest, and costs due. The vessel was detained by the United States, and by the proceedings in court from the time of her arrival at New York, February 13, to August the 7th, 1866, when she was regularly discharged from the service of the United States by Major Jennings, Brev. Maj. and A. Q. M., by written notice to the master: and it is for 150¾ days of this time the owner of the Othello claims he is entitled to be paid, by the terms of the contract. The master was required during all this time to report daily to the chief quartermaster of New York, and did so report, holding himself amenable to the orders of the United States officers.

The record of the proceedings of the district and circuit courts of New York was in proof before the Court of Claims, and upon these facts the Court of Claims dismissed the claimant's petition, and decided, as a conclusion of law,

"That the detention of the Othello by the marshal resulted from marine risks, which the claimant, in the charter-party, assumed; that the master of the Othello has no authority, without communicating or attempting to communicate his intention to the Department, to hypothecate the cargo; that the detention was owing to the claimant's failure to pay the bottomry bond."

ERRORS OF LAW.

1. THE COURT ERRED, IN DECIDING THE CASE UPON A POINT NOT OPEN TO IT, AND ONE WHICH WAS RES ADJUDICATA.

It decided the bottomry bond was void, because the master executed it "*without communicating or attempting to*

communicate to the defendant his intention to do so before he executed it. Now, the the circuit court decided that the bottomry bond was good upon the vessel, but not on the *cargo*, for the reason it consisted of munitions of war, belonging to the United States, and the district court had not jurisdiction over it. It settled the question of the validity of the bottomry bond. The court, in their finding of facts, say that "on the 26th of July the cargo was discharged from the marshal's custody, in consequence of a decision of the United States circuit court, on appeal from the district court, that the latter court had no jurisdiction to subject the cargo belonging to the United States to the payment of said bond, and judgment was entered against the vessel for the full amount of the bond." And on the 7th of August, the "Othello" was discharged from the service of the United States at the port of New York. (See 5th Blatchford's Rep., p. 343.) Why the Court of Claims should deem it necessary to revise or correct Judge Nelson's ruling, and say the bond was void, when he had decided otherwise, is not readily perceived. Nor is it seen why the Court of Claims should undertake to rule the bottomry bond was void as to the cargo for want of previous notice, when the circuit court held it good, and dismissed the claim upon the cargo, not for the want of notice, but for the want of jurisdiction. If the bond was good upon the vessel without notice, under the circumstances, it was equally good upon the cargo without notice.

But as the fact of the validity of the bond was a settled one, *res adjudicata*, by a court of competent of jurisdiction and its judgment not appealed from, it certainly bound parties and privies. Hence, we maintain the question was not any longer an open one. And the court erred in dismissing the petition for that reason.

2. BUT IF IT WAS AN OPEN ONE, THEN, FOR THE 2D GROUND OF ERROR, WE ALLEGE THE COURT DECIED IT ERRONEOUSLY.

The master of a vessel in a foreign port in distress, without money, friends, or credit, may bottomry the *vessel* and

cargo, to enable him to complete his voyage. Judge Kent says, (vol. 3, p. 131, 1st ed.:) "It is clearly settled, that the master, when abroad, in the absence of the owner, may hypothecate the ship, freight, and cargo to raise money requisite for the completion of the voyage," and cites 3 Rob. Adm. Rep., 240, in support of the text. And to the same point is 3d Mason's C. C. Rep., p. 255.

In the case of the Hamburgh, cited and relied upon by the Court of Claims, (2d Maritime Cases, p. 1,) the court say: "In relation to the necessity of notice to the owners, before encumbering the cargo with a bottomry bond, each case must be judged by its own pecular circumstances."

The court can judicially take notice that St. Thomas is a foreign Danish port, in an unfrequented out-of-the-way place, with no mail facilities to the United States.

Was it reasonable for this master, with his vessel in a sinking condition, to lay idle in this foreign port, until he could send a message either to his consignor or consignees, await their reply or instructions, which in all human probability would have required months of time for an answer to reach him? In the meantime, his vessel exposed to the prey of the worms, and he perhaps be thrown into the next summer for repairs in the tropics. Working the pumps of his vessel constantly to keep her afloat, and his crew upon expenses during the time. By the terms of his contract he was bound to repair. During the detention, the vessel could receive no compensation. The captain went to work, repaired his vessel, and incurred 44 days of detention, and finally completed his voyage. He had no authority under his contract, as he was upon a per diem for the use of the vessel and crew, to forward cargo by another vessel.

3. Point of Error. Notice would have been unavailing, and was therefore unnecessary.

If notice had been given, as the court below say it should have been, it must have been given either to consignor or consignee, and they would have to communicate

with the Secretary of War. What could he do? The Secretary of War was not the owner: he is only an agent, with such power as the law confers. He had no money at his disposal, appropriated by law, to forward to the captain. He could not have ordered the *cargo* to be sold in a foreign port, and the voyage to be broken up. For no officer has power to dispose of public property, except by the authority of an act of Congress.

United States *v.* Nicole, 1 Paine's Reports, p. 646.
Seabury *v.* Field, 1 McAllister Reports, pp. 1, 142.

The master performed his duty in repairing his vessel and in completing his voyage. The *vis major* that compelled him to seek shelter in a foreign port rested upon him while there, and he carried it along with him to his port of destination, to wit: the safety of his vessel and cargo, and the lives of his crew.

4. POINT OF ERROR. IF NOTICE WAS NECESSARY, BEFORE BOTTOMRY, THE AGREEMENT MADE IN NEW YORK FOR A NEW APPRAISAL OF THE CARGO, AND A NEW ADJUSTMENT OF THE GENERAL AVERAGE, WAS A WAIVER OF ANY OMISSION OF NOTICE FROM ST. THOMAS.

The controversy in New York, and the detention of the vessel by the United States, turned solely upon the question whether the vessel became, by the terms of the charter, a vessel of the United States. The Secretary maintained and kept possession of the vessel, to test the question in the courts of the United States. He could not do this without claiming and controlling the vessel. If he had discharged her, he would have defeated his own suit.

When the Government is called upon to perform its contract, it should not deny, in the face of the acts of its agents, the use and control of the vessel. The vessel, for the one hundred and fifty days for which pay is claimed, was tight, staunch, and strong, and the officers performed the duty required of them. How, then, can pay be avoided?

There was no misconduct on the part of master or owner during this time; but it may be said, as it was in the court below, the master did not deliver his cargo, and therefore the United States are not liable on the charter-party. The answer is, for non-delivery of cargo, the master held a *lien*, to secure him for his liability for money expended in and about the preservation of the cargo. If this was paid or secured, he was ready and willing to deliver cargo, and retained the possession of it for that purpose only.

5. POINT OF ERROR. THE CASE WAS ONE FOR CLAIM OF GENERAL AVERAGE UPON THE PART OF THE OWNER, AND THE MASTER HAD A LIEN FOR ITS PAYMENT EVEN AS AGAINST THE UNITED STATES.

In cases of general average the master and owner may retain goods of the shipper until their share of the contribution towards average is either paid or secured.

Abb. on Shp., p. 3, chap. 8, § 17.
2 Barn. & Cres., 805–811.
3 B. & A., p. 523.
6 Robts., p. 383.
2 Brown's Adm. Law, p. 201.

The same lien exists in regard to goods belonging to the United States.

United States *v.* Wilder, 3 Sumner's Rep., p. 308.
The Jane, 1 Dodson's Rep., p. 461.
Pritchard's Adm., p. 90.

If the Government finds it necessary and convenient, in the discharge of its proper functions, to make use of the instrument of a bill of exchange, it has repeatedly been held, it became subject thereby to the law merchant, with all of its legal incidents.

15 Peters' Rep., p. 377.
2 Howard's Rep., p. 711.

By parity of reason, as well as by weight of authority, if the United States enter into a contract of charter-party, or

make a maritime contract, why should it not be governed by maritime law applicable to such contracts?

So held Lord Stowell and Judge Story in the cases cited from Dodson and Sumner's Reports.

The vessel might as well have been discharged on the 1st of March as on the 7th of August. How the United States can work out the problem, that they may retain the vessel and control the conduct of the master, and then refuse to pay for the use of the vessel, remains to be seen.

6. The claimant bases claim upon the contract for so long a time as the United States War Department required the use of the vessel for any purpose.

The alleged mistake of the master constitutes no defense to the claim and suit.

The detention of the vessel in New York arose, not from the mistake of the master, but from the mistake of the Secretary of War, in retaining the use and possession of the vessel, to litigate in the courts the question whether she was a United States ship of war, and whether the Government was her owner. Judge Nelson decided that the hire and use of the vessel was a matter of contract resting in covenant.

The authorities of the United States mistook the law quite as much as did the master, if notice, previous to bottomry, was indispensable. But that question, it is contended, is not an open one at this time.

T. J. D. FULLER,
Counsel for Appellants.

Additional Points.

1. When the vessel became disabled by the perils of the sea the law cast upon the master new responsibilities; he was no longer acting under his contract of agency. He became a new agent, with such powers as the emergency and the necessities of the case imposed upon him. It was an agency that he was not at liberty to reject or decline. The law imposed it upon him, from his prior relation to the owners of the *vessel* and *cargo*. He became a *salvor* of the property intrusted to his care.

2. The necessities of the case, the perils of the sea, operating upon and endangering the safety of the vessel and cargo, and the new position of the master, required the exercise of his best judgment and discretion. The voyage, by the perils of the sea, became broken up; he could not proceed further with it.

He was compelled to unload and store his cargo in a foreign port. The *wharfinger* and the *warehouseman* acquired a *lien* upon the cargo. The master could not reload his vessel without the discharge of this *lien*. It mattered but little to these parties whether the cargo belonged to the United States, or consisted of munitions of war. It was in their possession, and they could retain it until their bills were paid.

3. The master in discharging these bills became *subrogated* to their rights, and represented them in the port of New York, and could retain the cargo until its payment.

4. The United States distinctly put in issue, before the court in New York, its *title* to the vessel and cargo, retaining the use of the vessel for this purpose.

5. Why should the United States decline to pay for the use of the vessel for this period?

6. Can the alleged misconduct of the master form any excuse? The United States might have discharged the

vessel for the alleged misconduct of the master; but failing to do so, they elected to continue the contract.

7. The master as agent, acting in good faith for both parties, ought to have his conduct viewed in the most favorable and equitable light.

T. J. D. FULLER,
Counsel for Appellants.

In the Supreme Court of the United States.

OCTOBER TERM, 1873.

ASAHEL GOODWIN, *Appellant*,
vs.
THE UNITED STATES. } No. 52.

Appeal from the Court of Claims.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1873.

ASAHEL GOODWIN, *Appellant*,
vs.
THE UNITED STATES. } No. 52.

Appeal from the Court of Claims.

BRIEF FOR THE UNITED STATES.

The material facts in this case are very simple. The vessel was let to the United States under a charter party, whereby the United States were to bear the war risk and the owners the marine risk. And, under it, there can be no doubt that the owner retained possession and control of the vessel, and that the charter was not a demise of it to the United States.

Reid *vs.* The United States, 11 Wall., 591.

Leary *vs.* The United States, 14 Wall., 607.

The Othello, 5 Blatchf., C. C., 342.

The vessel was driven by stress of weather into the island of St. Thomas, in the West Indies, where she arrived on the 12th of December, 1865, and, on the 28th of that month, information of her having so put into St. Thomas was received by the Quartermaster at New York city. (R., p. 8.) At St. Thomas, on the 25th of January, 1866, the master, without having

communicated, or attempted to communicate, with the United States, or with any one in the Quartermaster's department of the army of the United States, or with any one authorized to represent the United States in regard to the cargo of said vessel, executed a bottomry bond on the vessel, freight, and cargo, payable before the expiration of ten days after the arrival of the vessel at New York, and with stipulation that neither the vessel, freight, nor cargo should be delivered to any use or purpose whatsoever until the said bond should be paid, and the premium thereon as agreed. (R., p. 8.)

The Othello sailed from St. Thomas on the 25th of January, and arrived in New York on the 14th of February. The master and owner failed to pay the bottomry bond within the time, and the vessel and cargo were libelled therefor in the United States district court, and on the 10th of March, 1866, were attached, and the vessel was detained under the proceedings of said court until the 30th day of July. On the 26th day of July, the cargo was discharged from the marshal's custody in consequence of a decision of the United States circuit court that the district court had no jurisdiction to subject the cargo belonging to the United States to the payment of said bond.

See The Othello, *ubi supra*.

All claim against the United States on the part of the claimant on general average was adjusted and paid, and all claim for compensation under the charter party, except for the one hundred and fifty days during which

she was detained by the marshal under the aforesaid libel.

It is plain that the circumstances which forced the Othello to put into St. Thomas were within the marine risk which the owners had assumed.

Morgan *vs.* The United States, 14 Wall., 531.
Leary *vs.* The United States, *ibid.*, 607.
Reybold *vs.* The United States, 15 Wall., 202.

The master had no right to hypothecate the cargo without communicating or attempting to communicate with some officer of the Government. The island of St. Thomas is within easy communication of New York and Washington. Information of the fact that the Othello had put in there had been given to the quartermaster at New York, by letter, sixteen days after it took place, and a month before the bottomry bond was executed.

The ordinary rule of law is, that the master has no right to hypothecate the cargo of a vessel, as against the owners thereof, if he has a reasonable opportunity of communicating with them and receiving directions from them in respect of it.

The Hamburg's cargo, 2 Moore, P. C. N. S., 289.
1 Parsons on Shipping, 142, *note.*

This rule should apply *a fortiori* where the vessel is chartered by the Government.

It does not appear in this case that the cargo was of a perishable nature, or that there was any particular reason why communication should not be made, and the time which elapsed between the arrival of the

Othello at St. Thomas and the execution of the bottomry bond was ample for communicating or attempting to communicate with the Government officers. Certainly, in the case of the hypothecation of the cargo of a vessel at a port so near the home country as St. Thomas is to the United States, the burden is upon the master to show the impossibility of communicating with the owners of the cargo, and the necessity of hypothecating the cargo without communicating or attempting to communicate with them.

If this is so, the case would seem to be clear. The claimant seeks to recover compensation for the one hundred and fifty days during which the vessel was detained on account of the process in admiralty on a bottomry bond which did not bind the Government, and which was rendered necessary in respect of the vessel because of perils of the sea, of which the claimant had assumed the risk. Her detention resulted from no default of the Government, and the Government was not bound to aid in her redemption.

C. H. HILL,
Assistant Attorney General.